

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

RONNIE MONTROSE,	)	
	)	
Plaintiff(s),	)	No. C09-2146 BZ
	)	
v.	)	
	)	
GARY MOORE,	)	<b>ORDER GRANTING DEFENDANT'S</b>
	)	<b>MOTION TO DISMISS FOR LACK</b>
Defendant(s).	)	<b>OF PERSONAL JURISDICTION</b>
	)	
_____	)	

Plaintiff Ronnie Montrose ("Montrose") filed this action against Gary Moore ("Moore") demanding the return of a 1959 Gibson Guitar that he claims was stolen approximately thirty seven years ago.<sup>1</sup> Montrose does not allege that Moore stole the valuable guitar; to the contrary, he alleges that Moore bought the guitar in good faith. Moore, a resident of the United Kingdom, has moved to dismiss the complaint for lack of personal jurisdiction and to quash service of process.

The only jurisdictional allegation in the complaint and its accompanying exhibits is that Moore has "substantial and

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<sup>1</sup> All parties have consented to my jurisdiction pursuant to 28 U.S.C § 636(c) for all proceedings, including entry of final judgment.

1 continuous contacts with the United States and this judicial  
 2 district through his business partnership with the Gibson  
 3 Guitar Corporation and continual sales of his music within  
 4 this judicial district . . . ." Complaint ¶ 3. In his  
 5 opposition to this motion, Montrose alleges several additional  
 6 contacts with the forum state, but neglected to support them  
 7 by declaration. Moore, who filed several declarations, seized  
 8 on this deficiency in his reply brief, arguing this failure is  
 9 dispositive.<sup>2</sup>

10 "The party seeking to invoke the jurisdiction of the  
 11 federal court has the burden of establishing that jurisdiction  
 12 exists." Data Disc, Inc. v. Sys. Tech. Assocs., Inc., 557  
 13 F.2d 1280 (9th Cir. 1977). "Uncontroverted allegations in  
 14 [the] complaint must be taken as true, and conflicts between  
 15 the facts contained in the parties' affidavits must be  
 16 resolved in [plaintiff's] favor." Rio Props., Inc. v. Rio  
 17 Int'l Interlink, 284 F.3d 1007, 1019 (9th Cir. 2002).

18 However, "if plaintiff's allegations of jurisdictional facts  
 19 are challenged by his adversary in any appropriate manner, he  
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21 <sup>2</sup> Seventeen days after Moore noted in his Reply that  
 22 Montrose's opposition was "utterly lacking any form of  
 23 evidentiary support" (Reply p.1, line 24), Montrose filed a  
 24 "Supplemental Declaration" in an effort to meet this argument.  
 25 Moore's motion to strike the declaration is **GRANTED** for two  
 26 reasons. First, the declaration is untimely and Montrose has  
 27 provided no explanation for late filing. Nor did Montrose seek  
 28 relief from his failure. Second, filing a declaration after  
 the briefing is closed, thus depriving an opponent of an  
 opportunity to meet the declaration, is disfavored. See U.S.  
ex rel. Meyer v. Horizon Health Corp., 565 F.3d 1195, 1202-03  
 (9th Cir. 2009). In any event, the assertions in Montrose's  
 Supplemental Declaration add little to what was asserted by  
 counsel in his opposition memorandum and, for the reasons  
 discussed herein, do not support the assertion of jurisdiction  
 over Moore.

1 must support them by competent proof." McNutt v. General  
2 Motors Acceptance Corp. of Indiana, 298 U.S. 178, 189 (1936).

3 Here, Montrose has failed to submit any competent  
4 evidence sufficient to establish jurisdiction. Moore's  
5 declarations directly refute all jurisdictional facts alleged  
6 in the complaint and opposition. There is no conflict in  
7 evidence however because Montrose has not submitted any proof  
8 to rebut Moore's declarations. For this reason alone, I must  
9 grant Moore's motion.

10 Even assuming I could treat the unsupported contentions  
11 in his brief as facts, Montrose has failed to establish  
12 general or specific jurisdiction over Moore. The exercise of  
13 personal jurisdiction over a nonresident defendant by a forum  
14 state is not inconsistent with due process if the nonresident  
15 defendant has certain "minimum contacts" with the forum "such  
16 that the maintenance of the suit does not offend 'traditional  
17 notions of fair play and substantial justice.'" Int'l Shoe  
18 Co. v. Washington, 326 U.S. 310, 316 (1945) *quoting* Milliken  
19 v. Meyer, 311 U.S. 457, 463 (1940).

20 Courts may exercise either general or specific  
21 jurisdiction over a nonresident defendant. Helicopteros  
22 Nacionales de Columbia S.S. v. Hall, 466 U.S. 408, 414 nn. 8-9  
23 (1984). Montrose contends that this court has both general  
24 and specific jurisdiction over Moore.<sup>3</sup>

25 General jurisdiction exists where a defendant's  
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27 <sup>3</sup> California's long arm statute, which controls in this  
28 diversity action, allows the exercise of personal jurisdiction  
on any basis provided under the federal constitution. Cal.  
Code of Civ. Pro. § 410.10

1 activities in the state are "substantial" or "continuous and  
2 systematic," even if the cause of action is unrelated to those  
3 activities. Data Disc, Inc., 557 F.2d at 1287. Where general  
4 jurisdiction is inappropriate, a court may still exercise  
5 specific jurisdiction if the defendant has sufficient minimum  
6 contacts with the forum state in relation to the plaintiff's  
7 cause of action. Id. "The standard for establishing general  
8 jurisdiction is fairly high and requires that the defendant's  
9 contacts be of the sort that approximate physical presence."<sup>4</sup>  
10 Bancroft & Masters, Inc. v. Augusta Nat. Inc., 223 F.3d 1082,  
11 1086 (9th Cir. 2000) (Internal citations omitted).

12 In support of general jurisdiction, Montrose alleges<sup>5</sup>  
13 that Moore sells his music directly to citizens of this state  
14 through his website, [www.garymoreshop.com](http://www.garymoreshop.com). Montrose further  
15 alleges that Moore has sold records, compact discs, and DVD's  
16 in this jurisdiction on a continuous basis for twenty years,  
17 and derives royalty income from this district when his songs  
18 air on public broadcasts. Montrose contends that Moore  
19 operates a virtual store in California because he has 150  
20 songs for sale on iTunes. Finally, Montrose argues that Moore  
21 receives royalties from the Gibson Instruments Corporation of  
22 Nashville, Tennessee for a line of guitars sold at the Guitar  
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24 <sup>4</sup> The factors to consider for general jurisdiction  
25 include "whether the defendant makes sales, solicits or engages  
26 in business in the state, serves the state's markets,  
27 designates an agent for service of process, holds a license, or  
is incorporated there." Bancroft, 223 F.3d at 1086.

28 <sup>5</sup> All of the following factual allegations refer to  
unsupported statements contained in Montrose's opposition to  
this motion.

1 Center in San Francisco.

2 These allegations do not rise to the level of  
3 approximating physical presence in the forum state. Montrose  
4 has cited no authority that supports general jurisdiction in a  
5 case like this. Mattel, Inc. v. MCA Records, 296 F.3d 894  
6 (9th Cir. 2002) and Zippo Mfg. Co. v. Zippo DOT Com, Inc., 952  
7 F. Supp. 1119 (W.D.Penn. 1997), on which Montrose relies, are  
8 both specific jurisdiction cases. Courts have found general  
9 jurisdiction based on internet sales, where defendants derived  
10 substantial revenue from and explicitly directed marketing  
11 activities towards the forum state. See Gator.com Corp. v.  
12 L.L. Bean, Inc., 341 F.3d 1072 (9th Cir. 2003) and  
13 Coremetrics, Inc. v. Atomic Park.com, LLC, 370 F.Supp. 2d 1013  
14 (N.D. Cal. 2005). This case is readily distinguishable.  
15 Moore's undisputed declaration states that the website  
16 generated 23 sales to California residents for a total of  
17 £382.15 in revenue since it was launched in 2006 and that no  
18 marketing activities were aimed at California.

19 Moore similarly refutes the rest of Montrose's  
20 unsupported factual statements with sworn declarations and  
21 citation to legal authority. Limited sale of records and DVDs  
22 alone does not give rise to general jurisdiction. See Scott  
23 v. Breeland, 792 F.2d 925, 928 (9th Cir. 1986). Regarding the  
24 royalties argument, Moore submitted sufficient proof that (1)  
25 he receives music royalties from a UK based company alone and  
26 that (2) he personally has no relationship with the Guitar  
27 Center. Montrose has failed to carry his burden under McNutt  
28 to establish general jurisdiction.

1 For specific jurisdiction to exist: "1) the nonresident  
2 defendant must have purposefully availed himself of the  
3 privilege of conducting activities in the forum by some  
4 affirmative act or conduct; 2) plaintiff's claim must arise  
5 out of or result from the defendant's forum-related  
6 activities; and 3) exercise of jurisdiction must be  
7 reasonable." Roth v. Marquez, 942 F.2d 617, 620-21 (9th Cir.  
8 1985).

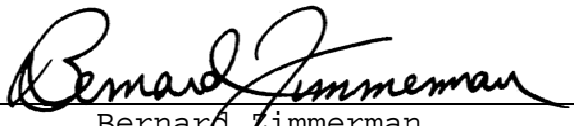
9 In order to prove purposeful availment, Montrose must  
10 show "purposeful direction," defined by the "three-part  
11 'effects' test traceable to the Supreme Court's decision in  
12 Calder v. Jones, 465 US 783 (1984)." Schwarzenegger v. Ford  
13 Martin Motor Co., 374 F.3d 797, 800 (9th Cir. 2004). The  
14 defendant must have 1) committed an intentional act, 2)  
15 expressly aimed at the forum state, which 3) causes harm that  
16 the defendant knew was likely to be suffered in the forum  
17 state. Id.

18 Montrose has not stated any additional facts that would  
19 satisfy the three part Calder test. Instead, he contends that  
20 Moore's failure to return the Gibson guitar upon demand to  
21 plaintiff in California constitutes an intentional act  
22 expressly aimed at California that causes harm that Moore knew  
23 would be felt in California. Montrose has cited no authority  
24 to support this contention and it is too much of a bootstrap.  
25 If accepted, it would substantially undermine the due process  
26 requirement for personal jurisdiction. It would allow any  
27 plaintiff to manufacture specific jurisdiction in the forum  
28 state by the simple expedient of sending a demand letter.

1 For example, in Calder v. Jones, the plaintiffs, residents of  
2 California, had demanded a retraction from the Florida  
3 defendants.<sup>6</sup> Had that been a sufficient contact to sustain  
4 specific jurisdiction, the Supreme Court's ruling would have  
5 been quite short and it would not have had to engage in the  
6 extensive analysis which produced its three part test. The  
7 due process clause is not as shallow as plaintiff contends.

8 Defendant's motion to dismiss for lack of personal  
9 jurisdiction is **GRANTED**. The motion to quash service of  
10 process is therefore moot. **IT IS THEREFORE ORDERED** that the  
11 complaint be **DISMISSED**.

12 Dated: November 5, 2009

13   
14 Bernard Zimmerman  
15 United States Magistrate Judge  
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28 <sup>6</sup> Jones v. Calder, 138 Cal. App. 3d. 128, 130 (1982).